Supreme Court, U.S.
FILED
DEC 3 1979
MICHAEL RODAK, JR., CLERK

No. 79-121

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	14
Argument	
I. No Sixth Amendment violation results from mere association or general conversation between a defendant and an informant	20
A. A Sixth Amendment violation does not occur unless the government has caused the accused to be questioned about the offense	20
B. The policies of the Sixth Amendment do not support an extension of *Massiah* and *Brewer* to bar the admission of statements made to an informant who did not interrogate the accused or otherwise elicit the statements	27
1. The Court has generally recognized the Sixth Amendment right to the assistance of counsel in the context of "trial-like confrontations" between the government and the accused in which the accused is confronted with complex legal proceedings or an expert adversary	28

Argument—Continued Page

2. Sixth Amendment policies do not support a broad expansion of the *Massiah* exclusionary rule 32

3. The general rule that no Sixth Amendment violation occurs in the absence of interrogation applies in the jail setting..... 40

II. Even if the informant had violated his instructions from the FBI agent not to question respondent about his offense, this questioning would not have constituted government interrogation 45

Conclusion 51

CITATIONS

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25..... 28
Beatty v. *United States*, 389 U.S. 45..... 11, 26
Beckwith v. *United States*, 425 U.S. 341.. 34, 41
Bell v. *Wolfish*, No. 77-1829 (May 14, 1979) 40
Brewer v. *Williams*, 430 U.S. 387 .....*passim*
Burdeau v. *McDowell*, 256 U.S. 465 48
Coleman v. *Alabama*, 399 U.S. 1 ..... 29, 30
Corngold v. *United States*, 367 F.2d 1.... 49, 50
Edelman v. *Jordan*, 415 U.S. 651 26
Escobedo v. *Illinois*, 378 U.S. 478 .....25, 33, 34
Fare v. *Michael C.*, No. 78-334 (June 20, 1979) 28
Faretta v. *California*, 422 U.S. 806 31
Flagg Bros. v. *Brooks*, 436 U.S. 149..... 48
Gerstein v. *Pugh*, 420 U.S. 103 30

Cases—Continued Page

Gideon v. *Wainwright*, 372 U.S. 335..... 28
Gilbert v. *California*, 388 U.S. 263 31
Hamilton v. *Alabama*, 368 U.S. 52 29
Hampton v. *United States*, 425 U.S. 484.. 37
Hoffa v. *United States*, 385 U.S. 293..... 37
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 48
Johnson v. *Zerbst*, 304 U.S. 458 28
Kirby v. *Illinois*, 406 U.S. 682 26
Lanza v. *New York*, 370 U.S. 139 41
Massiah v. *United States*, 377 U.S. 201..9, 10, 15, 23, 24, 25, 32, 33, 37
McLeod v. *Ohio*, 381 U.S. 356 ..... 11, 26
Mempa v. *Rhay*, 389 U.S. 128 30
Michigan v. *DeFillippo*, No. 77-1680 (June 25, 1979) 47
Michigan v. *Tucker*, 417 U.S. 433 26
Miller v. *California*, 392 U.S. 616 ..... 40, 43
Milton v. *Wainwright*, 407 U.S. 371 42
Miranda v. *Arizona*, 384 U.S. 436 ..... 34, 41
Moore v. *Illinois*, 434 U.S. 220 ..... 28, 30
Moose Lodge v. *Irvis*, 407 U.S. 163 48
Oregon v. *Mathiason*, 429 U.S. 492 34
Parker v. *Randolph*, No. 78-99 (May 29, 1979) 26
People v. *Cardona*, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 46
Powell v. *Alabama*, 287 U.S. 45 ..... 28, 31
Reitman v. *Mulkey*, 387 U.S. 369 48
Rochin v. *California*, 342 U.S. 165 37
Schmerber v. *California*, 384 U.S. 757.... 31
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 30
Scott v. *Illinois*, 440 U.S. 367 31
Sherman v. *United States*, 356 U.S. 369.. 50
Spano v. *New York*, 360 U.S. 315 ..... 24, 35

Cases—Continued — Page

State v. *Ferrari*, 112 Ariz. 324, 541 P.2d 921 49
State v. *McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 26
State v. *Smith*, 107 Ariz. 100, 482 P.2d 863 49
United States v. *Aloisio*, 440 F.2d 705, cert. denied, 404 U.S. 824 49
United States v. *Ash*, 413 U.S. 300..... 28, 29, 35, 37
United States v. *Barfield*, 461 F.2d 661.... 41
United States v. *Clegg*, 509 F.2d 605..... 49
United States v. *Hayles*, 471 F.2d 788, cert. denied, 411 U.S. 969 44
United States v. *Hearst*, 563 F.2d 1331, cert. denied, 435 U.S. 1000 ..... 41, 44
United States v. *Janis*, 428 U.S. 433..... 48
United States v. *Luciow*, 518 F.2d 298.... 49
United States v. *Massiah*, 307 F.2d 62..... 23, 25
United States v. *Mekjian*, 505 F.2d 1320.. 49
United States v. *Rodriguez*, 596 F.2d 169.. 49
United States v. *Russell*, 411 U.S. 423..... 37
United States v. *Stonehill*, 274 F. Supp. 420, aff'd, 405 F.2d 738, cert. denied, 395 U.S. 960 49
United States v. *Valen*, 479 F.2d 467, cert. denied, 419 U.S. 901 ..... 49, 50
United States v. *Wade*, 388 U.S. 218..... 30
United States v. *Washington*, 431 U.S. 181 22
United States v. *Wedelstedt*, 589 F.2d 339, cert. denied, No. 78-1383 (June 4, 1979) 49
United States v. *White*, 401 U.S. 745..... 37, 39

Cases—Continued — Page

United States ex rel. Milani v. *Pate*, 425 F.2d 6, cert. denied, 400 U.S. 867..... 50
Watts v. *Indiana*, 338 U.S. 49 32
Weatherford v. *Bursey*, 429 U.S. 545..... 26, 44
White v. *Maryland*, 373 U.S. 59 29
Wilson v. *Henderson*, 584 F.2d 1185, cert. denied, No. 78-6610 (June 18, 1979) 43, 51

Constitution, statutes and rule:

United States Constitution:
Fourth Amendment 48
Fifth Amendment 17, 34, 35, 36, 37,39, 40
Sixth Amendment .....*passim*
Fourteenth Amendment 48

18 U.S.C. 2113(a) 3
18 U.S.C. 2113(d) 3
28 U.S.C. 2255 .....6, 10, 14
Fed. R. Crim. P. 12 12

Miscellaneous:

Developments in the Law—Confessions, 79 Harv. L. Rev. 938 (1966) 26
Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203 (1975) 41
Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964).. 32, 33, 34, 37
Funk & Wagnalls New Standard Dictionary (1946) 24

Miscellaneous—Continued Page

Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1 (1979) ..32, 33, 36, 37, 38
Kamisar, *Brewer* v. *Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1 (1978) 35-36
3 Murray, *A New English Dictionary* (1897 ed.) 24
Restatement (Second) of Agency (1958) .. 47
Webster's New International Dictionary (2d ed. 1953) 24
Webster's New International Dictionary (3d ed. 1961) 21, 24

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 590 F.2d 544. The memorandum order of the district court (Pet. App. 27a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on December 26, 1978. The government's petition for rehearing was denied on March 30, 1979 (Pet. App. 26a). On June 14, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28,

1979. The petition was filed on July 25, 1979, and was granted on October 1, 1979 (A. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent's Sixth Amendment right to assistance of counsel was violated by the admission of statements he made in the course of general conversation with a cellmate who had agreed to act as a government informant but who had been instructed not to question respondent.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT

1. On August 28, 1972, the Janaf Branch of the United Virginia Bank/Seaboard National was robbed at gunpoint by two masked men who entered shortly after opening, as the bank's employees were processing the night deposits (A. 12-14, 16-17;

Tr. 10-12, 35-36). Respondent was indicted on charges of armed robbery of the bank, 18 U.S.C. 2113(a) and (d), and was incarcerated prior to trial in the Norfolk City Jail.

Shortly thereafter Gerald Coughlin, an FBI agent who participated in the investigation of the Janaf bank robbery, contacted Edward Nichols (Pet. App. 57a). At that time, Nichols, who had previously acted as a paid FBI informant, was incarcerated in the Norfolk City Jail on local forgery charges (*id.* at 57a-58a). Nichols informed Coughlin that he was being held in the same cell block with various federal prisoners who were awaiting trial, including respondent (*id.* at 58a).[1] Agent Coughlin asked Nichols to be alert to any statements made by these persons about the charges against them, but he specifically instructed Nichols not to initiate conversation with or question them regarding the charges against them (*id.* at 58a, 60a). Nichols later informed agent Coughlin that respondent had engaged him in conversation, during the course of which respondent had described how the bank robbery had occurred and sought Nichols' assistance in making contact with some people outside of the jail when Nichols was released (*id.* at 58a-59a). The FBI paid Nichols for furnishing this information (*id.* at 59a).

---

[1] Nothing in the record indicates that Coughlin contacted Nichols in order to gain evidence about respondent's involvement in the Janaf bank robbery. To the contrary, Coughlin's statement suggests that he was not aware that respondent and Nichols were in the same cellblock until Nichols informed him of this fact (see Pet. App. 58a-59a).

2. Respondent was tried before a jury in the Norfolk Division of the United States District Court for the Eastern District of Virginia. Several bank employees described the robbery, which was carried out by two men wearing green overalls, sneakers, and masks (A. 12-17; Tr. 10-12, 26-28, 35-40). One employee observed the robbers drive away in a tan Ford automobile with Virginia license BBL-373 (Tr. 38-39) and also observed a third man who had been waiting in the automobile (Tr. 40). The bank employees could not identify the men who entered the bank because they were wearing masks (Tr. 10). An employee of a nearby business also testified that he observed the third man in the car. This witness had previously identified one of the two men who had been in the bank as someone other than respondent (A. 18-19; Tr. 47-49), but he could not describe the other man who had been in the bank (A. 19-20; Tr. 50).

An FBI agent testified that about an hour after the robbery, agents searching the area near the bank discovered the getaway car, which had been left illegally parked, with the doors ajar (Tr. 72-74). When the agents searched the car, they discovered a rent receipt indicating money received from one Allen R. Norris and a lease for a house on Wailes Avenue in Norfolk (Tr. 74-76). Shortly thereafter, two men subsequently convicted of participating in the robbery were arrested at the rented house, where agents also discovered the proceeds of the robbery, as well as the guns and masks the robbers had employed (Tr.

78-82). Other witnesses testified that respondent had rented the house on Wailes Avenue under the assumed name of Allen R. Norris, that his palm print was identified on the copy of the lease agreement found in the getaway car, that respondent had been seen at the rented house before the robbery with another man, identified as John Luck (one of the two men previously convicted of participation in the robbery), and that respondent, again under an assumed name, had ordered parts for a police radio scanner found at the rented house (A. 37-48; Tr. 154-159, 167, 169-170, 177-181, 182-185, 190-192, 196).

Nichols, the informant whom FBI agent Coughlin had contacted at the Norfolk City Jail, also testified at trial, without objection. He stated that respondent had said that he went to the Janaf bank several times before the robbery, on one occasion to see who opened the vault. Nichols also testified that respondent had described the robbery to him and had stated that the only thing the prosecution had connecting him to it was the rent receipt (A. 29, 30; Tr. 135-136, 138). Nichols testified that FBI agent Coughlin did not request him to ask respondent specific questions (A. 28-29; Tr. 135).

Joseph Sadler, who had also been respondent's cellmate, testified that respondent told him that he (along with a man named "Luck" or "Lucky," and another man whom he did not name) had robbed a bank and that he had hit one of the bank employees with a gun (A. 33; Tr. 142). Sadler stated that he had informed the FBI of respondent's statements on the

advice of his attorney in relation to his own case (A. 33-34; Tr. 143-144).

Respondent was convicted and sentenced to imprisonment for a term of 25 years (A. 50; Tr. 249). His conviction was affirmed by the court of appeals in a per curiam order, 483 F.2d 1401 (1973), and certiorari was denied, 421 U.S. 915 (1975).

3. On August 28, 1975, respondent moved to vacate his sentence pursuant to 28 U.S.C. 2255. Among other grounds for relief, respondent alleged for the first time that the introduction of Nichols' testimony violated his right to counsel.[2] Respondent alleged (A. 53, 56-57, 65; see also A. 75-76) that the FBI may have placed him in the same cell with Nichols and Sadler, that Nichols had "interrogated" him, that the FBI had sent Nichols to "question" him or "engage [him] in conversation" about the case, and that Nichols had come back to visit respondent at the Norfolk City Jail and later at the Portsmouth City Jail to ask him questions about the crime.

---

[2] Respondent's pro se petition (A. 51-71) also alleged that the government had knowingly permitted the introduction of perjured testimony by Joseph Sadler, violated the court's pretrial discovery order, made prejudicial statements in closing argument, and failed to disclose exculpatory material; the petition also alleged that respondent's counsel had not rendered effective assistance.

In an amended pro se complaint filed June 27, 1977 (A. 71-81), respondent renewed these allegations and further contended that his arrest warrant was not supported by probable cause, his right to counsel was violated when FBI agent O'Hara spoke with him in the Marshal's Office after his arrest, his competency to stand trial was destroyed by adverse jail conditions, a hearing should have been held on his competency to stand trial, the search of the Wailes Avenue residence was not supported by probable cause, and his sentence was illegal.

The district court denied the motion without a hearing. The court of appeals, in an unpublished order (Pet. App. 53a-56a), remanded the case for an "evidentiary inquiry" to determine, *inter alia*, whether Nichols was acting as a government agent during his jail cell conversations with respondent.

On remand, FBI agent Coughlin submitted an affidavit (Pet. App. 57a-60a) describing his relationship with Nichols. Coughlin stated (*id.* at 58a) that he had contacted Nichols on November 21, 1972, at the Norfolk City Jail. According to the affidavit, Nichols told Coughlin that he was in the same cellblock as respondent and a number of other federal prisoners awaiting trial. Coughlin stated that he recalled telling Nichols to be alert to any statements these individuals might make about the charges pending against them, but that he specifically told Nichols not to question respondent or the others about the charges against them. Coughlin also stated that Nichols was told not to initiate any conversations with respondent regarding the bank robbery charges, but that if respondent or the other federal inmates engaged him in conversation, he was to pay attention to their statements.

Coughlin contacted Nichols again on December 6, 1972, after Nichols had been released from the Norfolk City Jail. Nichols told Coughlin (Pet. App. 58a-59a) that respondent had engaged him in conversation while they were in jail together and had talked about the bank robbery charges against him. Nichols also said, according to the affidavit, that respondent had told him that he and his partner had been looking at the Janaf bank for some time and that respondent

described to Nichols how the robbery had occurred. Nichols also told Coughlin that respondent had requested Nichols to contact a woman named "Hink" after Nichols was released from jail because respondent wanted to use the woman as a go-between with his partner, who he said was in the Portsmouth City Jail. Finally, Nichols told Coughlin that respondent had asked him to obtain a handcuff key and floor plans to the Norfolk City Jail and the Marshal's Office because respondent wanted to break out of jail.[3]

Coughlin stated in the affidavit that Nichols made contact with the woman "Hink" on December 7. Nichols was paid by the FBI for the information he had furnished and for expenses and services in connection with respondent's requests (Pet. App. 59a). Coughlin also averred (*id.* at 59a-60a) that he had not requested that Nichols be placed in respondent's cell and had not interceded with jail officials on Nichols' behalf. He also stated (*id.* at 60a) that he never interviewed Joseph Sadler and never requested anyone at the Norfolk City Jail or Portsmouth City Jail to place Sadler and respondent in the same cell.

Nicholas O'Hara, the FBI agent in charge of the investigation of the bank robbery, also submitted an affidavit (A. 84-85). He stated that he was aware that agent Coughlin had obtained information from an informant (Nichols) but that, to his knowledge, this informant was not directed by either Coughlin or O'Hara to solicit information from respondent.

[3] Nichols did not testify at trial about respondent's request for assistance after Nichols was released from jail.

O'Hara also stated in his affidavit that Sadler, in an interview on February 28, 1973, in the Norfolk City Jail, had furnished him with information that respondent had "volunteered" to Sadler. O'Hara stressed that he did not direct Sadler to seek out and obtain information from respondent and that he did not contact the authorities at the Norfolk and Portsmouth City Jails to arrange for any particular person to be placed in a cell with respondent or to arrange for respondent's transfer while in custody. Nor, O'Hara said, had he made any contact on these matters with the United States Marshal's Office, which was responsible for arranging accommodations for federal prisoners.

The district court accepted the FBI agents' statements that they had not requested Nichols to question respondent or to engage him in conversation and had only asked Nichols to listen to statements respondent might make within his hearing and to report them. The court also noted (Pet. App. 38a, 39a) that Nichols had testified at trial that agent Coughlin had not requested that he ask questions of respondent (see A. 28-29; Tr. 135). Finally, the court found (Pet. App. 39a) that respondent's allegation that the FBI had something to do with where he was housed or with having Nichols placed in a cell with him was "clearly untrue."

On the basis of these factual findings, the district court concluded (Pet. App. 39a) that Nichols' testimony at trial did not violate respondent's Sixth Amendment right to counsel under this Court's decision in *Massiah* v. *United States*, 377 U.S. 201

(1964). The court noted that *Massiah* had held that a defendant's own incriminating words "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel" could not be used against him (Pet. App. 39a n.5, quoting 377 U.S. at 206). But in this case, the court observed (*id.* at 39a), "the evidence clearly shows Nichols was not employed to question [respondent] or to seek information from him, but to merely report what he heard. There is no requirement an accused be furnished counsel when he wishes to shoot off his mouth."[4]

4. A divided panel of the court of appeals reversed and remanded with instructions that respondent be released from custody unless the government elects to retry him (Pet. App. 1a-24a). The majority opinion (*id.* at 5a) did not read the decision in *Massiah* to depend on a finding that any action by the informant, apart from his "mere presence," had induced the damaging remarks, although it did note (*id.* at 5a n.2) that the opinion of the court of appeals in *Massiah* indicated that the informant in that case had affirmatively solicited information about the

[4] The district court also concluded (Pet. App. 39a-40a) that, even assuming Nichols' testimony was subject to exclusion, respondent had not objected to the testimony at trial and could not raise an objection to the admission of this evidence in a Section 2255 proceeding. The court distinguished *Massiah*, which "dealt with the admissibility of evidence, objected to, on direct appeal and not a collateral attack on its admission" (*id.* at 39a n.5). The court also held that, in any event, admission of the testimony was harmless error.

charges pending against the accused. The majority opinion (Pet. App. 5a) also read this Court's summary reversals in *McLeod* v. *Ohio*, 381 U.S. 356 (1965), and *Beatty* v. *United States*, 389 U.S. 45 (1967), to stand for the proposition that the rule in *Massiah* applies to "all incriminating statements obtained by government agents after indictment and in the absence of counsel," not "only to those statements *induced* by such agents" (Pet. App. 5a; emphasis in original).

The majority opinion (Pet. App. 6a) also rejected the argument that the decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), had limited *Massiah* and its progeny to situations in which the government agent had directly questioned the accused about his participation in a crime. The majority found the term "interrogation," as used in *Brewer* v. *Williams*, to be a relative term not restricted to formalized questioning (Pet. App. 6a) and concluded (*id.* at 7a):

> If, by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer*. We hold therefore that [respondent's] right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.

Finding that the admission of Nichols' testimony could not be deemed harmless beyond a reasonable

doubt, the majority reversed the judgment of the district court (Pet. App. 7a-8a).[5]

Judge Butzner, who joined in the majority opinion, stated in a concurring opinion (Pet. App. 9a) that the critical issue was whether the informant had "elicited information" from respondent in the absence of counsel. "Proof of formal interrogation is unnecessary to invoke the protection of the sixth amendment. A conversation that is tantamount to interrogation is sufficient" (*ibid.*, *citing Brewer* v. *Williams*, *supra*, 430 U.S. at 397-401). He noted in this regard (Pet. App. 8a) that Nichols had admitted at trial that he had "some conversations" with respondent (See A. 28; Tr. 134) but did not divulge what he had said to respondent.

Judge Butzner indicated (Pet. App. 8a, 9a) that it would have been prudent for the district court to hold an evidentiary hearing, in view of respondent's claim that Nichols had questioned him about the case and the government's failure to reveal the substance of

[5] Neither the panel's opinion nor the concurring and dissenting opinions addressed the district court's ruling that respondent had waived this claim by his failure to object to Nichols' testimony at trial. On appeal, respondent contended (Reply Br. 4 & n.5) that no waiver of this objection occurred at trial because respondent was unaware of the critical fact that Nichols was a paid government informant, and thus lacked the information necessary to assert his *Massiah* claim. Because the court of appeals did not address the issue, and also because the trial antedated the 1975 amendments to Fed. R. Crim. P. 12, dealing with waiver of claims for exclusion of evidence, we have not presented the waiver issue for review by this Court.

Nichols' admitted conversations with respondent. But Judge Butzner did not urge a remand for such a hearing to determine whether a "conversation that is tantamount to interrogation" had taken place. Instead, he concluded (Pet. App. 9a) that, "absent testimony by the informant about what he said to [respondent], the judgment must be reversed because of the informant's admission that he had conversed with [respondent] and because of [respondent's] assertion that the conversation was a form of questioning."[6]

Judge Russell dissented (Pet. App. 10a-24a). He stated (*id.* at 10a) that *Massiah* and *Brewer* require "exclusion only when the challenged testimony is the result of 'interrogation.'" Quoting Justice Blackmun's dissenting opinion in *Brewer* v. *Williams*, *supra*, 430 U.S. at 440, Judge Russell concluded (Pet. App. 12a; emphasis in original) that neither an informant's presence alone nor his listening constitutes interrogation: "The mere 'subjective desire to obtain information from a suspect after arraignment,' if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of 'interrogation.'" Since "[t]he record indicates that the [respondent's] incriminating statements

[6] Judge Butzner noted (Pet. App. 9a-10a) that the district court's harmless error ruling was founded on the mistaken belief that there had been an eyewitness identification of respondent as one of the bank robbers. We have not presented the fact-bound harmless error issue for review by this Court.

were voluntarily and spontaneously given without any encouragement from Nichols," Judge Russell found (Pet. App. 14a) that "there was no 'interrogation' of [respondent] by Nichols, however broadly that term may be defined." Moreover, *Brewer* established, in his view, that "whether the confession or damaging admission had been 'elicited surreptitiously' was 'constitutionally irrelevant'" (Pet. App. 15a, quoting 430 U.S. at 400).

The government's petition for rehearing with suggestion of rehearing en banc was denied, with three judges dissenting (Pet. App. 26a).

SUMMARY OF ARGUMENT

The decision by the court of appeals that evidence of respondent's incriminating admissions should have been excluded from his trial was not based on a finding that Nichols, the informant, had questioned respondent about the bank robbery or had otherwise affirmatively sought to induce him to make incriminating statements. There is nothing in the record, other than respondent's unsupported allegations in his original and amended motions under 28 U.S.C. 2255, showing such questioning or inducement. The court of appeals found a violation of respondent's Sixth Amendment rights solely on the basis of the possibility that respondent might have bared his incriminating secrets to Nichols because he developed confidence in Nichols as a result of association or general conversation with him in the jail.

The court of appeals' holding constitutes an extension of the Sixth Amendment right to counsel that is not supported by prior decisions of this Court or justified by the policies of the Sixth Amendment. Without endorsing the district court's choice of words, we submit that it was correct in concluding (Pet. App. 39a) that there is "no requirement an accused be furnished counsel when he wishes to shoot off his mouth."

I

A. In its most recent discussion of the Sixth Amendment issue, *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Court made clear that the Sixth Amendment does not require the exclusion at trial of incriminating statements of the accused merely because he made the statements following a period of association with police officers while in custody or in the course of general conversation with those officers about matters unrelated to the charges against him. The Court found a Sixth Amendment violation in *Brewer* only because it concluded that the statements introduced at trial were the product of interrogation by a police detective, and the Court expressly stated (430 U.S. at 400) that there would have been no Sixth Amendment violation if there had been no interrogation.

The Court has applied the same rule with respect to the introduction at trial of statements made to a person the accused does not know to be an undercover police officer or informant. The Court's holding in *Massiah* v. *United States*, 377 U.S. 201 (1964), the

principal decision regarding the admissibility of post-indictment statements made to an informant, was dependent on the fact that the government had "deliberately elicited" incriminating statements from the accused by having the informant induce the accused to talk about the charges against him, not on the mere fact that the government placed itself in a position to overhear those statements.

B. Sixth Amendment policies and precedents do not justify the court of appeals' extension of *Massiah* and *Brewer* to require the exclusion of statements made by an accused without any interrogation or provocation by the government. In other areas, the Court has extended the right to counsel to pretrial judicial proceedings or other encounters between the accused and the government, characterized as "trial-type confrontations," at which the assistance of counsel is necessary to enable the accused to cope with unfamiliar legal proceedings or to counterbalance the expert professional prosecutor. In these situations, counsel is an advocate before the prosecutor and the court in situations that advance the case toward disposition, and counsel's presence is required to ensure that the accused does not forfeit procedural rights and to ensure the integrity of the truthfinding process.

The reasons for basing the *Massiah* exclusionary rule upon the Sixth Amendment right to counsel were not fully explicated in the opinion in that case. In fact, the *Massiah* rule appears to represent something of a departure from the main thrust of Sixth

Amendment jurisprudence. Unlike other applications of the right to counsel, the *Massiah* rule does not operate to foster or protect counsel's role as a representative whose expert assistance is necessary to minimize prejudice resulting from sources wholly external to the accused, such as unfamiliar legal proceedings or confrontations with witnesses. Counsel's role in *Brewer* and *Massiah* would presumably have been nothing more than to advise the accused to remain silent.

This suggests that the exclusionary rule, insofar as it seeks to ensure that an accused is not deprived of advice when being questioned by the government, may be concerned more with protection of the values served by the Fifth Amendment privilege against compelled self-incrimination than with protection of the kinds of rights for which professional legal assistance is customarily thought to be required. But while concern about the risk of compelled self-incrimination is appropriate when the accused is, as in *Brewer*, subjected to overt interrogation, the hazard of coercion is almost entirely absent when, as in this case, the accused engages in conversation with someone whom he does not know to be a government agent.

From a broader perspective, the decision in *Massiah* is perhaps best understood as reflecting a concern about the propriety of utilizing certain investigative techniques directed against the accused after the matter has progressed to an accusatory stage. Nevertheless, it is not entirely clear why an investigative technique, such as the use of an informant to

report back admissions made by the accused, which is entirely lawful before formal proceedings have been commenced, should become entirely unlawful thereafter. The initiation of proceedings does not always correspond to the completion of the investigation of a crime, and there may remain strong societal interests, compatible with the Sixth Amendment's policy to secure to the accused a fair trial, that call for the continuation of at least some investigation directed at the accused after the point of formal charge. These interests counsel against a broad extension of *Massiah* and *Brewer* to require the exclusion of statements that are fundamentally the product of the accused's volition and not of interrogation designed to elicit such statements.

In any event, applying the Sixth Amendment analysis used in the cases generally, it is clear that the mere passive presence of a government officer or informant in a position to overhear incriminating statements is not the type of "trial-like confrontation" at which the presence of counsel is required. Only where the government officer or informant engages in affirmative conduct intended to draw information from the accused about the charges against him can the encounter reasonably be compared to a "trial" or characterized as a "critical stage" of the prosecution at which the presence of counsel is necessary to enable the accused to deal with an expert adversary or unfamiliar procedures.

The result should be no different in the present case because respondent made the statements while

he was in jail awaiting trial instead of while free on bail, as was the defendant in *Massiah*. Although an inmate in jail does not have the freedom to choose his associates, this has no bearing on the Sixth Amendment issue. The loss of freedom inherent in incarceration is imposed for reasons wholly unrelated to inducing the defendant to speak. Mere incarceration prior to trial therefore cannot constitute "deliberate elicitation" of any incriminating statements the accused happens to make while in jail. Thus, the Sixth Amendment would not prohibit the introduction at trial of incriminating statements overheard by a jail official or an informant placed in an adjoining cell, because there would have been no affirmative action designed to induce the accused to talk. The same is true when statements are made to an informant sharing a cell with the accused, if the informant did not interrogate the accused or engage in conduct tantamount to interrogation in order to extract incriminating statements.

II

Even if the informant had questioned respondent about the charges against him, the Sixth Amendment should not be held to require exclusion of respondent's statements at trial. *Massiah* and *Brewer* require exclusion only where the government caused the accused to be interrogated or deliberately elicited the statements from him. In the present case, the responsible FBI agent expressly instructed the informant not to question respondent or to initiate conversation about the bank robbery. This demonstrates a meti-

culous concern on the government's part for respondent's Sixth Amendment rights. The purpose of the Sixth Amendment exclusionary rule to prohibit deliberate elicitation of statements by the government would therefore not be sufficiently furthered by prohibiting admission at trial of statements that followed questioning by an informant in complete disregard of his instructions to justify the costs associated with exclusion.

ARGUMENT

I

NO SIXTH AMENDMENT VIOLATION RESULTS FROM MERE ASSOCIATION OR GENERAL CONVERSATION BETWEEN A DEFENDANT AND AN INFORMANT

A. A Sixth Amendment Violation Does Not Occur Unless the Government Has Caused the Accused to be Questioned About the Offense

The court of appeals, while conceding that there was no evidence that Nichols had disobeyed instructions not to question respondent, nevertheless held (Pet. App. 7a) that respondent's Sixth Amendment right to the assistance of counsel was violated because, "by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer" in the absence of counsel. The court found such association or general conversation to be "interrogation within the meaning of *Brewer*" (*ibid.*), requiring exclusion of respondent's statements at trial. The court's conclusion stretches the word "interrogation" far beyond the common understanding of the term[7] and far beyond the connotation intended in *Brewer*.

A reading of this Court's decisions demonstrates that, contrary to the conclusion of the court of appeals, the use by the government of an incriminating statement made outside the presence of counsel does not violate the Sixth Amendment, even if the statement is made while in association or general conversation with an informant. A Sixth Amendment violation has been held to occur only when the government deliberately elicits the statement—*i.e.*, engages in affirmative conduct reasonably calculated to overcome the accused's reluctance to talk for the specific purpose of inducing him to make incriminating statements.

In *Brewer* the defendant made incriminating statements while riding with police officers for several hours on a journey from Davenport to Des Moines, Iowa. The Court never suggested that the mere association between the officers and the defendant during the automobile trip to Des Moines itself entitled the defendant to the presence and assistance of counsel. Moreover, while en route, the defendant and the officers "embarked on a wide-ranging conversation covering a variety of topics" unrelated to the charges against him. 430 U.S. at 392. Yet the Court did not base its finding of a Sixth Amendment violation

---

[7] *Webster's New International Dictionary* (3d ed. 1961) defines "interrogate" to mean "to question typically with formality, command, and thoroughness for full information and circumstantial detail."

on the fact that the defendant happened to have made an incriminating statement following a period of general conversation with the police officers. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States* v. *Washington*, 431 U.S. 181, 187 (1977).

Thus, the Court in *Brewer* found a Sixth Amendment violation only after it concluded that the "Christian burial speech" made by the police detective in the car was a deliberate effort to elicit information that was tantamount to formal interrogation by the government (430 U.S. at 399-400); indeed, the Court specifically concluded that no Sixth Amendment right to counsel "would have come into play if there had been no interrogation." *Id.* at 400; see also *id.* at 410-413 (Mr. Justice Powell, concurring).[8]

The Court's decision in *Massiah* v. *United States*, *supra*, makes clear that the same standard applies where, as in the present case, the accused happens to make an incriminating statement in the presence of or overheard by a government agent or informant whose status as such is not known to the accused. The holding in *Massiah* was premised on surreptitious *questioning* of the defendant that was *intentionally*

[8] The dissenting opinions did not question the majority's premise that the presence of interrogation was a prerequisite to finding a constitutional violation. They concluded only that there had been no interrogation, 430 U.S. at 416 (Mr. Chief Justice Burger); *id.* at 438-441 (Mr. Justice Blackmun), or that there had been a waiver of the right to counsel, *id.* at 429-430 (Mr. Justice White).

arranged by the government, not on the mere fact that the statements were overheard by an informant and a government agent who happened to be in proximity to the accused.

In *Massiah* the informant, the accused, and other persons were jointly indicted for conspiracy to commit certain narcotics offenses. A few days after the indictment, and without Massiah's knowledge, one of his co-defendants decided to cooperate with the police in the continuing investigation of the narcotics activities. The informant permitted a government agent to install a radio transmitter under the front seat of his automobile. 377 U.S. at 202-203. The opinion of the court of appeals indicates that the informant, pursuant to the government's instructions, invited the defendant to enter his automobile and induced him to talk about the pending case. *United States* v. *Massiah*, 307 F.2d 62, 66 (2d Cir. 1962); *id.* at 72 (dissenting opinion). A government agent overheard the conversation by means of the transmitter installed in the informant's car and testified about the defendant's statements at trial. The court of appeals affirmed the conviction, but this Court reversed, finding a violation of the defendant's Sixth Amendment right to the assistance of counsel.

Although it is said in the Court's statement of the case that the government had overheard the statements (377 U.S. at 203), it is clear that the Court did not premise its finding of a Sixth Amend-

ment violation on the overhearing alone.[9] The Court's express holding was that "the petitioner was denied the basic protections [of the Sixth Amendment right to the assistance of counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added); see also *id.* at 204.

The term "elicit" connotes a drawing out through affirmative action such as questioning, not simply overhearing,[10] and analysis of the Court's decision indicates that it intended the phrase "deliberately elicited" to mean procured through purposeful questioning of the defendant. The Court based its holding in part on the opinions of the four concurring Justices in *Spano* v. *New York*, 360 U.S. 315, 324-327 (1959),

[9] For example, the Court noted that petitioner argued in the case that it was constitutional error to permit the agent to testify about the statements he had overheard "under the circumstances disclosed by this record." 377 U.S. at 203; see also *id.* at 207. The circumstances disclosed by the record demonstrate, of course, that the informant had solicited information about the case from the defendant.

[10] *Webster's New International Dictionary* (3d ed. 1961) defines "elicit" to mean "to draw or bring out (something latent or potential) * * * to call forth or draw out." *Funk & Wagnalls New Standard Dictionary* (1946) defines "elicit" to mean: "To draw out as by some attraction or inducement; educe gradually or without violence; bring to light; as, to *elicit* information by inquiry; to *elicit* a reply." See also 3 Murray, *A New English Dictionary* (1897 ed.) ("to extract, draw out (information) *from* a person by interrogation"). Indeed, the word connotes a drawing out against the will or inclination of the other person. See *Webster's New International Dictionary* (2d ed. 1953).

which the *Massiah* Court took to be that reversal of a conviction is required when it is based upon a confession that had been "deliberately elicited by the police" after indictment (377 U.S. at 204). *Spano* involved in-custody interrogation of the defendant without the presence of counsel, and the quoted description of *Spano* therefore equates "deliberate elicitation" with interrogation.

The Court made the same point later in the *Massiah* opinion in the course of rejecting the government's suggestion that *Spano* could be distinguished because that case involved interrogation at the police station, while *Massiah* involved damaging admissions obtained from the defendant without his knowledge while he was free on bail. The Court stated that if its rule against deliberate elicitation of incriminating statements after indictment and in the absence of counsel " 'is to have any efficacy it must apply to indirect and surreptitious *interrogations* as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon * * * because he did not even know that he was under *interrogation* by a government agent.' " 377 U.S. at 206, quoting 307 F.2d at 72-73 (Hays, J., dissenting) (emphasis added).[11] Similarly, in explaining *Mas-*

[11] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), decided just five weeks after *Massiah*, held that police interrogation of the defendant after his arrest (but before indictment or other commencement of proceedings) in the absence of counsel and despite his request for counsel violated his Sixth Amendment rights. There was no occasion for the Court to consider

siah, the Court in *Brewer* stated (430 U.S. at 401) that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." [12]

---

whether conduct falling short of such direct questioning would have violated the Sixth Amendment.

The holding in *Escobedo* that the defendant was entitled to the assistance of counsel even though proceedings had not yet been instituted against him has not been extended, and this aspect of *Escobedo* has been limited to its own facts. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). See also *Michigan* v. *Tucker*, 417 U.S. 433, 438 (1974).

[12] The court of appeals found support (Pet. App. 5a) for its broad holding that a Sixth Amendment violation occurs merely by virtue of the presence of a government informant or general conversation between the informant and the accused from the summary reversals by this Court in *Beatty* v. *United States*, 389 U.S. 45 (1967), and *McLeod* v. *Ohio*, 381 U.S. 356 (1965). In neither of these cases did the Court write an opinion, and it is well settled that such summary dispositions do not have the same precedential effect as cases fully briefed and argued on the merits. See *Parker* v. *Randolph*, No. 78-99 (May 29, 1979), slip op. 12-13 n.8 (plurality opinion); *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974).

In any event, a reading of the state court opinion reversed in *McLeod* demonstrates that the central question there was whether *Massiah* is applicable after the commencement of judicial proceedings but before an attorney has actually been retained by or appointed for the accused. *State* v. *McLeod*, 1 Ohio St. 2d 60, 62-63, 203 N.E.2d 349, 351-352 (1964). See *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 999 (1966).

As for *Beatty*, any inference from the facts of that case that the Court was prepared to extend *Massiah* to mere acquisition of statements made by the accused without government provocation does not survive *Brewer*. See also *Weatherford* v. *Bursey*, 429 U.S. 545, 557-558 (1977).

B. The Policies of the Sixth Amendment Do Not Support an Extension of *Massiah* and *Brewer* to Bar the Admission of Statements Made to an Informant Who Did Not Interrogate the Accused or Otherwise Elicit the Statements

The Court did not fully articulate in *Massiah* and *Brewer* the Sixth Amendment principles underlying the right to counsel in situations in which the accused makes incriminating statements in the presence of a government agent or informant. A review of the precedents suggests that these holdings are something of a departure from other cases considering the Sixth Amendment right to counsel, especially where, as in *Massiah* and in the present case, the accused does not even realize that he is in the presence of a government agent or informant. Moreover, the holding in cases such as *Massiah* and *Brewer*, requiring the exclusion of admissions or confessions by the accused, deprives the courts and the public of highly probative and reliable evidence. Exclusion cannot therefore be justified in terms of that aspect of the right to counsel that is meant to safeguard the accuracy of the truthfinding process. These factors caution against extending *Massiah* to new situations unless compelling considerations of constitutional policy require that result. No such compelling considerations are present here.

1. *The Court Has Generally Recognized the Sixth Amendment Right to the Assistance of Counsel in the Context of "Trial-Like Confrontations" Between the Government and the Accused in Which the Accused is Confronted with Complex Legal Proceedings or an Expert Adversary*

Historically, the principal concern underlying the Sixth Amendment guarantee is the recognition that an unaided layman has little skill in arguing the law or in coping with an intricate procedural system. *United States* v. *Ash*, 413 U.S. 300, 307 (1973). Unfamiliar with rules of evidence or the standards by which to judge the charges against him, and lacking the skill and knowledge to prepare his defense, the defendant requires the "guiding hand of counsel." *Id.* at 307-308, quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); see also *Fare v. Michael C.*, No. 78-334 (June 20, 1979), slip op. 11, 14; *Argersinger* v. *Hamlin*, 407 U.S. 25, 31-35 (1972); *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). The assistance of counsel is also necessary to minimize the imbalance in the adversary system that results when "the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, *supra*, 304 U.S. at 463; see also *Moore* v. *Illinois*, 434 U.S. 220, 228-230 (1977); *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344.

The core of the counsel guarantee, at least as an historical matter, related to the assistance of counsel at trial, where the defendant would most directly confront the professional prosecutor and the complexities of the legal system. But over time, evolving concepts of due process led to judicial recognition that significant events occur before trial at which the defendant might likewise be confronted with intricate procedures or the professional prosecutor. See *United States* v. *Ash*, *supra*, 413 U.S. at 309-310. Accordingly, the Court extended the right to counsel to these additional "trial-like confrontation[s]" between the government and the accused (*id.* at 314)—encounters "that might appropriately be considered to be parts of the trial itself" (*id.* at 310). But in deciding whether to hold that the Sixth Amendment conferred a right in the circumstances, the Court consistently has been informed by the historical purposes underlying the guarantee—assisting the accused to cope with the legal system and his expert adversary—"and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311.

For example, in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), the Court held that arraignment under Alabama law was a "critical stage" in the criminal proceeding at which the defendant was entitled to appointment of counsel, because certain pleas and defenses had to be made at that time or not at all, and what happened at arraignment might therefore affect the whole trial. *Id.* at 54; see also *White* v. *Maryland*, 373 U.S. 59 (1963). Similarly, in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), the Court held that the Alabama preliminary hearing was a critical stage of

the prosecution at which "the guiding hand of counsel * * * is essential to protect the indigent accused against an erroneous or improper prosecution." 399 U.S. at 9 (plurality opinion). Counsel could, for example, expose factual weaknesses in the State's case and persuade the magistrate not to bind the accused over, preserve the testimony of witnesses favorable to the accused who might not appear at trial, fashion an impeachment tool for witnesses against the accused, endeavor to discover the State's case, and make effective arguments for the accused on such other matters as release on bail. *Ibid.* See also *Moore* v. *Illinois*, *supra*, 434 U.S. at 228; *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Compare *Gerstein* v. *Pugh*, 420 U.S. 103, 122-123 (1975).

The Court has also recognized a right to the assistance of counsel in certain confrontations between the accused and the government outside of the context of formal judicial proceedings. For example, in *United States* v. *Wade*, 388 U.S. 218 (1967), the Court held that a pretrial lineup was a critical stage in the prosecution at which the accused is entitled to the assistance of counsel in order to protect his right to a fair trial. *Id.* at 226-227. In that context, the assistance of counsel is required, absent a waiver, to ensure that the lineup itself is not conducted in a suggestive or otherwise impermissibly prejudicial fashion that might affect the accuracy of testimony at trial, as well as to enable the defense to confront the identifying witnesses effectively at trial. *Id.* at 228-238; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 239 (1973).

But the Court has been cautious in expanding the Sixth Amendment right to counsel into new areas, cf. *Scott* v. *Illinois*, 440 U.S. 367 (1979), particularly in areas that do not involve formal proceedings. It has not, for example, extended the right to counsel to pretrial photographic identifications at which the accused himself is not present, because that situation does not involve a confrontation *by the accused* with an expert adversary or intricate or confusing proceedings. *United States* v. *Ash*, *supra;* cf. *Faretta* v. *California*, 422 U.S. 806 (1975). The Court has also indicated that the right to counsel recognized in *United States* v. *Wade*, *supra*, is not to be extended to other encounters at which the government extracts potentially unfavorable evidence from the accused, but which do not involve complex proceedings, confrontation with witnesses, or a realistic danger that the expert prosecutor or his agents will impermissibly prejudice the accused. See *Gilbert* v. *California*, 388 U.S. 263, 267 (1967) (no right to counsel at taking of handwriting exemplars); cf. *Schmerber* v. *California*, 384 U.S. 757, 765-766 (1966).

In all of the situations just discussed in which the Court has found a Sixth Amendment right to counsel, the role of the attorney has been the affirmative one of preparing the case on behalf of the defense (see *Powell* v. *Alabama*, *supra*, 287 U.S. at 58) and acting as the defendant's advocate in encounters with the government at which the defendant's case is advanced toward disposition or at which the reliability of the truthfinding process might be unfairly undermined.

See Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 9-10 & n.59 (1979); Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 49-50 (1964).

2. *Sixth Amendment Policies Do Not Support a Broad Expansion of the* Massiah *Exclusionary Rule*

The right to the assistance of counsel identified in *Massiah* and *Brewer* cannot be so readily explained as a necessary protection at a stage in the proceedings or prosecution at which the case is advanced from charge to disposition or at which the accuracy of the truthfinding process might be unfairly affected. Aside, perhaps, from preventing overreaching to ensure that his client's responses are voluntary, counsel's role in *Massiah* and *Brewer*, as a practical matter, would probably be simply to tell the accused to say nothing, see *Watts* v. *Indiana*, 338 U.S. 49, 59 (1949) (Mr. Justice Jackson, concurring); Grano, *supra*, 17 Am. Crim. L. Rev. at 10 n.59, and thereby to deprive the court and the public of what will almost always be relevant and reliable evidence in the form of a confession or admission. See *Massiah* v. *United States*, *supra*, 377 U.S. at 209 (Mr. Justice White, dissenting).

The grounding in the Sixth Amendment of a right to counsel to accomplish this end has been questioned and criticized because of its perceived departure from the traditional, constitutionally recognized role of

counsel as an advocate and because of its tendency, like that of any prophylactic rule requiring the suppression of reliable evidence, to injure the strong public interest in enforcement of criminal laws; it is also objected to because it imposes the costs of evidentiary exclusion without regard to the presence or absence of genuine misconduct by the government in particular cases. *Massiah* v. *United States*, *supra*, 377 U.S. at 207-213 (Mr. Justice White, dissenting); *Escobedo* v. *Illinois*, 378 U.S. 478, 495-499 (1964) (Mr. Justice White, dissenting); Grano, *supra*, 17 Am. Crim. L. Rev. at 24-25; Enker & Elsen, *supra*, 49 Minn. L. Rev. at 66-69.[13]

---

[13] The role of counsel encompasses several distinct functions in the context of a criminal case. Virtually all of the Court's Sixth Amendment cases other than the *Massiah* line involve what might be called the representational function, which is not only important in assuring that the defendant is able to cope with complex legal proceedings, but which also serves an important societal goal of helping to assure that innocence will be vindicated when unfounded charges have been brought. The *Massiah* exclusionary rule, on the other hand, does not really operate to foster that function of counsel, but is instead concerned with what might be called the advisory or counselling function of the attorney—specifically, in this situation, counsel's role in advising the defendant against improvident actions or statements that might place incriminating evidence in the hands of the prosecution and ease its burden in establishing the defendant's guilt.

Without intending in any way to denigrate the importance and legitimacy of actions by counsel designed to keep a guilty defendant from carelessly or unwisely helping the prosecution, it is nevertheless not immediately evident that respect for this aspect of counsel's function demands application of an exclusionary rule that withholds probative evidence from the factfinder at trial. Provided the government has in no way impeded the giving and receipt of legal advice re-

These points seem particularly well-taken when the accused does not even know that he is speaking in the presence of a government agent or informant. In the view of some, to the extent that the Constitution speaks to the concerns underlying *Massiah* and *Brewer*, it is through the Fifth Amendment privilege against compulsory self-incrimination. See, *e.g.*, Enker & Elsen, *supra*, 49 Minn. L. Rev. at 57; cf. *Escobedo* v. *Illinois*, *supra*, 378 U.S. at 497 (Mr. Justice White dissenting). The Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in fact confirms that the right to counsel recognized in *Escobedo* was integrally related to protection of the Fifth Amendment privilege. *Id.* at 442, 464, 465.

The prophylactic measures adopted by the Court in *Miranda*, including the right to presence of counsel, were designed to protect the Fifth Amendment privilege in the specific setting of custodial police interrogation, which the Court believed to be inherently coercive. 384 U.S. at 445, 448-449, 469-473; *Beckwith* v. *United States*, 425 U.S. 341, 345-346 (1976). But the Court stressed that these protections would not apply in the absence of questioning, even when the suspect was in custody. 384 U.S. at 478.[14]

---

garding a pending criminal case, the balance between societal and individual interests with respect to counsel's functions would appear to tilt against the application of an exclusionary rule.

[14] Later cases have also made clear that the *Miranda* protections do not apply where there is interrogation, but at a time when the suspect is not in custody. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, *supra*.

A similar approach has been taken under the Sixth Amendment when the accused is in custody following the commencement of proceedings against him. As *Brewer* demonstrates, custody alone—a mere proximity to persons known to be police officers—does not constitute the kind of "trial-like confrontation" to which the counsel guarantee attaches. Custody could be transformed into something akin to a "trial-like confrontation" triggering the right to counsel only when the government actively seeks information from the accused through interrogation. 430 U.S. at 399-401; see also *Spano* v. *New York*, *supra*, 360 U.S. at 325-326 (Mr. Justice Douglas, concurring); *id.* at 327 (Mr. Justice Stewart, concurring). Only then is the accused engaged by an expert adversary on matters relating to the charges against him, and only then could counsel's presence be necessary to protect the accused's Fifth Amendment privilege against compulsory self-incrimination, which may be threatened by such custodial interrogation. Compare *Miranda* v. *Arizona*, *supra*.

The Court in *United States* v. *Ash*, *supra*, also described *Massiah* as a case in which the assistance of counsel was necessary because counsel "could have advised his client on the benefits of the Fifth Amendment." 413 U.S. at 312. But no Fifth Amendment protection was needed in *Massiah*, because, unlike the accused in *Brewer*, the defendant in *Massiah* was not even arguably compelled by the government to speak, and, in fact, was not compelled to speak at all. Kamisar, *Brewer* v. *Williams*, *Massiah*, *and Miranda:*

What Is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 59, 63 (1978); Grano, *supra*, 17 Am. Crim. L. Rev. at 21 n.134. Thus, even if *Brewer* is thought to be consistent with Sixth Amendment precedent because counsel's presence is required in order to protect the Fifth Amendment privilege when the defendant knows he is in the presence of and is engaged in questioning by expert adversaries, it does not necessarily follow that the Sixth Amendment is implicated to the same degree when the accused does not even perceive that he is in the presence of a government agent or informant and therefore is not confronted with the possibility of government compulsion to which the Fifth Amendment speaks. These considerations weigh against broadly extending the Sixth Amendment right to counsel identified in *Massiah* and *Brewer*, as the court of appeals did in the present case, to new situations in which there is no evidence of affirmative conduct by the government akin to the interrogation present in each of those cases.

The foregoing difficulties in viewing the *Massiah* result from a Sixth Amendment right to counsel perspective also suggest that the decision may in part really reflect a concern about the use of certain investigative techniques at the post-accusation stage, rather than the right to counsel as such.[15] It is of

[15] In *United States* v. *Ash*, *supra*, the Court identified another role for counsel in *Massiah*, aside from advising the

course clear that the use of an informant to obtain incriminating statements from an individual prior to the time that charges are filed against him is entirely lawful. See, *e.g.*, *United States* v. *White*, 401 U.S. 745 (1971) (plurality opinion); *Hoffa* v. *United States*, 385 U.S. 293 (1966). It is not immediately

defendant about the Fifth Amendment privilege: to "shelter" the defendant "from the overreaching of the prosecution." 413 U.S. at 312. This suggests that the Court may have believed that the use of the informant to question Massiah constituted overreaching for reasons wholly independent of the right to counsel. Others have read *Massiah* as focusing, at least in part, on investigative techniques. See Enker & Elsen, *supra*, 49 Minn. L. Rev. at 57, 80-82; *Massiah* v. *United States*, *supra*, 377 U.S. at 212 (Mr. Justice White, dissenting).

But the Court has, in other contexts, fully approved of the use of undercover methods to solve crimes. See, *e.g.*, *Weatherford* v. *Bursey*, *supra*; *United States* v. *Russell*, 411 U.S. 423 (1973); *United States* v. *White*, 401 U.S. 745 (1971). There is no reason for the surreptitious nature of the investigation here to be determinative, for the Constitution "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *United States* v. *White*, *supra*, 401 U.S. at 749, quoting *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).

In any event, it would be somewhat odd to couch rules intended to limit investigative techniques in terms of an interference with the right to counsel, at least where those techniques do not intrude directly into the relationship between the accused and his attorney. Therefore, to the extent concern about investigative practices plays a role in these cases, the Court may at some point wish to consider reviewing them under the Due Process Clause, cf. *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973); *Rochin* v. *California*, 342 U.S. 165 (1952), rather than abiding by the Sixth Amendment analysis, with its attendant difficulties. See Grano, *supra*, 17 Am. Crim. L. Rev. at 21 & n.129, 22.

apparent, from the standpoint of the propriety of police practice, why investigative activities that are entirely lawful prior to the commencement of formal proceedings should become entirely unlawful after. It has been suggested that such a distinction is appropriate because the filing of formal charges shifts proceedings from an investigative to an accusatory stage. Grano, *supra*, 17 Am. Crim. L. Rev. at 18-25. But the realities of criminal investigation are not so abruptly altered by a change in classification. In fact, the filing of formal charges may be quite unrelated to the completion of the investigation of a crime. In some cases it is true that formal proceedings are initiated only after exhaustive police investigations and grand jury proceedings culminating in an indictment; but in others, a person may be arrested and charged on the basis of probable cause arising in the immediate aftermath of an offense and during an early stage of the investigation, but before there has been an opportunity to investigate fully his connection with the crime.

These variations warrant caution in viewing formal charges as a watershed after which otherwise proper investigative procedures may no longer be directed at the accused in any fashion. Even after charges have been filed, it is necessary to balance the concerns that support restrictions on post-accusation investigative techniques against what may often be a strong societal interest in continuing investigation. The standard set forth in *Brewer* and *Massiah* strikes a viable balance: the government may not,

after formal proceedings have been commenced, seek to induce confessions or admissions from the defendant through interrogation or its functional equivalent, but it may obtain and use at trial statements that are a product of the defendant's own volition, not government prompting. Accordingly, where the government acquires the statement without an effort to overcome the accused's reluctance to discuss the charges against him, it is proper that the accused should bear the risk of improvident revelations. See *United States* v. *White*, *supra*, 401 U.S. at 752.

There is, however, no need to consider more fully here whether the concerns underlying the Court's decisions in *Massiah* and *Brewer* would more appropriately be considered in a Fifth Amendment due process or self-incrimination analysis rather than a Sixth Amendment framework, or whether the possible concerns underlying *Massiah* would be more productively analyzed by focusing on the propriety of the use of any particular investigative technique during the "accusatory" stage, rather than on the right to counsel. For, as explained above, it is clear under this Court's decisions in *Brewer* and the other cases discussing the Sixth Amendment right to counsel generally that no violation occurs unless the government interrogates the accused, or engages in conduct that is the functional equivalent of such interrogation. And if interrogation or its functional equivalent is the appropriate standard under *Brewer*, when the accused knows he is in the presence of government

agents (and is therefore directly confronted with the expert adversary whom defense counsel is intended to counterbalance and is threatened with possible invasion of his Fifth Amendment privilege), it follows *a fortiori* that nothing short of interrogation, or conversation tantamount to it, should trigger the Sixth Amendment right to counsel when, as here, the accused makes a statement to a person he does not know to be a government agent or informant.

3. *The General Rule that No Sixth Amendment Violation Occurs in the Absence of Interrogation Applies in the Jail Setting*

There is no basis for arguing that a broader prophylactic rule is required under the Sixth Amendment when incriminating statements are overheard by the government without the accused's knowledge while he remains in custody, as in the present case, than when he is free on bail, as in *Massiah*. It is true that inmates do not have the freedom to choose their associates, as the defendant in *Massiah* did, see *Miller* v. *California*, 392 U.S. 616, 624 (1968) (Mr. Justice Marshall, dissenting from dismissal of certiorari), but this has no bearing on the Sixth Amendment issue.[16] Loss of freedom is inherent in custody, *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 15,

[16] Indeed, to the extent that the mention of the freedom to choose one's companions suggests that *Massiah* is somehow based on notions of privacy, this rationale would seem to have less applicability when the accused is in custody. There is an inevitable loss of privacy in jail, *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 37, and "official surveillance has traditionally been the order of the day." *Lanza* v. *New York*, 370 U.S. 139, 143 (1962); cf. *United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). See generally Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203, 230 (1975).

and, significantly for present purposes, *it is imposed for reasons wholly unrelated to inducing the inmate to talk*, about his crime or about anything else. Thus, placing the accused in custody cannot alone be thought to constitute deliberate elicitation of any incriminating statements the accused might make while in custody. Cf. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 445, 448-449, 469-473; *Beckwith* v. *United States*, *supra*, 425 U.S. at 345-346.

Accordingly, in the present case, if the informant had been in the cell next to respondent and overheard him make incriminating statements to his cellmate, no Sixth Amendment violation would have occurred. See *United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). In that situation, it would be clear that the government had engaged in no affirmative conduct specifically designed to extract such statements from the accused. The same would be true if the accused made a statement that a prison guard happened to overhear. See, *e.g.*, *United States* v. *Barfield*, 461 F.2d 661 (5th Cir. 1972).

The result should be no different where the informant is in the same cell, rather than an adjoining one, and overhears statements that he has not in-

duced. In such a situation, there is likewise no incremental action by the government—beyond the fact of custody itself—that has the purpose or effect of drawing a confession or admission from the accused. The fact that the cellmate is an informant has no impact on the *accused*, because the informant appears to him to be an ordinary cellmate. Whether the accused makes any statements is therefore dependent on his own disposition to do so. Only if the informant interrogates the accused about the charges against him (or initiates a conversation about the charges that is "tantamount to interrogation") can it be said that any incriminating statements that follow have been improperly elicited.[17]

While this Court has twice granted review in cases involving the application of *Massiah* to the jail context, neither case resulted in a decision on the merits. In *Milton* v. *Wainwright*, 407 U.S. 371 (1972), a police officer posing as a fellow inmate was placed in the accused's cell and, after extensive prodding to overcome the latter's reluctance to discuss the offense with which he was charged, allegedly secured a confession. The Court merely assumed *arguendo* that this conduct, which appears to have been tantamount to rather extended interrogation, violated *Massiah;* it upheld the denial of habeas relief on the ground that admission of the confession at the accused's trial was harmless error in the particular circumstances of

[17] Even then, this elicitation should not be attributed to the government, where, as here, the government instructed the informant not to question the accused. See pages 45-51, *infra*.

that case. And in *Miller* v. *California*, 392 U.S. 616 (1968), which involved statements elicited by an undercover officer in the accused's cell prior to indictment, the writ was dismissed as improvidently granted. Obviously neither of these cases in the least undermines the conclusion that *Brewer*'s standard, requiring interrogation or its equivalent as a prerequisite to finding a *Massiah* violation, applies whether an accused is free on bond, in jail, or in any other form of custody.

The Second Circuit interpreted *Brewer* and *Massiah* in precisely this manner in *Wilson* v. *Henderson*, 584 F.2d 1185, 1190-1191 (2d Cir. 1978), cert. denied, No. 78-6610 (June 18, 1979). That case also involved a defendant who made incriminating statements to a cellmate who happened to be an informant. There, as here, the informant was instructed not to question the defendant about his crime, but to listen for any statements the defendant might make. The court found the absence of questioning dispositive under *Massiah* and *Brewer*, and it accordingly denied habeas relief. There, as here, "[t]he instructions to [the informant] suggest a conscious effort on the investigating officer's part to guard [the defendant's] constitutional rights * * *. His directions [not to question the defendant] suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*." 584 F.2d at 1191.

The Ninth Circuit also reads *Brewer* and *Massiah* as requiring interrogation as a prerequisite to a find-

ing of a Sixth Amendment violation when the government surreptitiously overhears incriminating statements made by the defendant. See *United States* v. *Hearst*, *supra*, 563 F.2d at 1347-1348. In *Hearst*, in which the government overheard conversations between the defendant and a friend in the visiting room of the jail where she was incarcerated prior to trial, the court found no violation of the right to counsel because the government had not formally or informally interrogated the defendant. See also *United States* v. *Hayles*, 471 F.2d 788, 791-792 (5th Cir.), cert. denied, 411 U.S. 969 (1973).[18]

On the record before the Court in this case, there is no evidence of affirmative action by the government, or by the informant Nichols, to induce respondent to make incriminating statements. The FBI agent instructed the informant not to question respondent, and there is no evidence in the record that he did so. Also, although we do not believe these additional facts to be indispensible to our position, the FBI agent did not request that the informant be placed in the cell with respondent and, in fact, did not even appear to know that he was in that cell. The court of appeals therefore erred in finding that respondent's right to counsel had been violated.

---

[18] See also *Weatherford* v. *Bursey*, *supra*, 429 U.S. at 551-552, pointing out that the government had overheard conversations by the defendant in *Black* v. *United States*, 385 U.S. 26 (1966), and *O'Brien* v. *United States*, 386 U.S. 345 (1967), some, but not all of which were with the defendant's counsel. The Court appears to have perceived a Sixth Amendment issue only with respect to the monitored conversations with defense counsel.

II

EVEN IF THE INFORMANT HAD VIOLATED HIS INSTRUCTIONS FROM THE FBI AGENT NOT TO QUESTION RESPONDENT ABOUT HIS OFFENSE, THIS QUESTIONING WOULD NOT HAVE CONSTITUTED GOVERNMENT INTERROGATION

As discussed above, the Court held in *Brewer* that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the *government* interrogates him." 430 U.S. at 401 (emphasis added). Thus, unless the *government* takes some affirmative action to elicit incriminating statements from the accused, no Sixth Amendment violation occurs when the accused makes incriminating statements to a third person, even though the third person in turn reports those statements to the government.

In the present case, Nichols was instructed not to question respondent about the crime of which he was accused, and there is nothing in the record to suggest that he did. But even if Nichols violated his instructions and questioned respondent, that unauthorized action should not be held to have constituted deliberate elicitation by the government that would justify suppression of respondent's statements under the *Massiah* exclusionary rule. This situation would be essentially the same as if a fellow prisoner had asked questions of respondent on his own initiative and only later decided to convey the information to the government. In neither case would the government have authorized the informant to question the respondent, and in neither should the questioning be attributed to the government.

This point is vividly illustrated in the present case. Sadler, another of respondent's cellmates, also testified at trial about incriminating statements made by respondent, but Sadler had not contacted the FBI until after respondent made the statements. From Sadler's testimony (A. 31-37; Tr. 140-150), it does not appear that he initiated conversations with respondent about the bank robbery. But if he had, it is clear that respondent's Sixth Amendment right to counsel would not have been violated when Sadler testified at trial because the government would not be implicated in the questioning at all. The result should not be any different with respect to any unauthorized questioning by Nichols.[19]

Moreover, where probative and reliable evidence such as a confession or admission is concerned, it is necessary to balance the interests to be fostered by application of an exclusionary rule against the important public interest in the availability of such evidence. The purpose of the *Massiah* exclusionary rule is to prevent the government from deliberately eliciting statements from the accused after proceedings have begun and introducing those statements at trial. This purpose would not be incrementally furthered by

[19] Even when a person awaiting trial has made no prior arrangements with the government to report statements made by a fellow inmate, he would have incentive to do so in order to make a favorable deal with the prosecution in his own case. See, *e.g.*, *People* v. *Cardona*, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 (1977). Indeed, in the present case, Sadler testified that he informed the FBI of respondent's statements on the advice of his attorney, in relation to his own case (A. 33-34; Tr. 143-144).

extending the exclusionary rule to a situation in which the responsible government agent—here FBI Agent Coughlin—in a good faith effort to comply with *Massiah*, instructed the informant not to question the accused and did not engage in any other action that attempted to bring about improper elicitation of the statements. Cf. *Michigan* v. *DeFillippo*, No. 77-1680 (June 25, 1979).

Thus, even if the informant in this case did violate his instructions and interrogated respondent about the bank robbery, only a wooden rule attributing to the government *all* acts of the informant without regard to the government's efforts to control or its responsibility for the informant's actions, would support exclusion of respondent's statements at trial.[20] But surely, not all acts of an informant with whom the responsible government official enters into a limited and specific relationship can be held to be deliberate governmental actions under *Massiah* and *Brewer*. Sixth Amendment principles do not support such attribution. Where an informant, rather than a trained undercover law enforcement officer, obtains the statements, without governmental involvement similar to that in *Massiah*, the accused is not confronted with

[20] We assume for present purposes that if Nichols were a government employee, rather than an informant, respondent's Sixth Amendment rights would have been violated even if Nichols countermanded specific instructions not to question respondent. But the government is not so broadly accountable for the acts of an agent who is not an employee, because of its diminished capacity to direct his actions. See *Restatement (Second) of Agency* § 216, Comment a (1958).

the expert governmental adversary whose skills are intended to be offset by defense counsel under the Sixth Amendment cases discussed above.

In addition, the cases establish that generally the government must significantly involve itself with private activity before that activity is rendered "governmental action" for purposes of constitutional protections. For example, in *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), the Court held that a state's grant of a liquor license to a private club that practiced racial discrimination did not render the discriminatory practice of that club "state action" for purposes of the Equal Protection Clause of the Fourteenth Amendment. The Court noted that where the impetus for the discrimination is private, the state must have "significantly involved itself" with the invidious discrimination in order for the action to fall within the ambit of constitutional prohibitions. 407 U.S. at 173, quoting *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Even where the government has extensive contacts with the private entity, specific actions by that entity will not give rise to a constitutional violation unless the government has in some manner approved it. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978). These principles have been applied in connection with the Fourth Amendment's exclusionary rule as well. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 456 n.31 (1976); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).

In the present case, there is no basis for concluding that the federal government "significantly involved itself" with any questioning Nichols might have instigated. There is no evidence that the government directed, authorized, encouraged or knew of any such questioning. See *United States* v. *Rodriguez*, 596 F.2d 169, 173 (6th Cir. 1979); *United States* v. *Wedelstedt*, 589 F.2d 339, 346 (8th Cir. 1978), cert. denied, No. 78-1383 (June 4, 1979); *United States* v. *Luciow*, 518 F.2d 298 (8th Cir. 1975); *United States* v. *Clegg*, 509 F.2d 605, 608-609 (5th Cir. 1975); *United States* v. *Valen*, 479 F.2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); compare *Corngold* v. *United States*, 367 F.2d 1, 4-5 (9th Cir. 1966) (en banc). Indeed, the FBI agent specifically disapproved of the conduct. See *United States* v. *Stonehill*, 274 F. Supp. 420, 422, 424 (S.D. Cal. 1967), aff'd, 405 F.2d 738 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969); *United States* v. *Mekjian*, 505 F.2d 1320 (5th Cir. 1975); *State* v. *Ferrari*, 112 Ariz. 324, 541 P. 2d 921, 928 (1975). The government did not operate the jail or have the authority to assign prisoners in the jail, compare *State* v. *Smith*, 107 Ariz. 100, 482 P.2d 863, 866 (1971), did not request that Nichols and respondent be placed in the cell in order to question respondent, *United States* v. *Aloisio*, 440 F.2d 705, 710 (7th Cir.), cert. denied, 404 U.S. 824 (1971), and did not engage in any other conduct that would suggest a

deliberate circumvention of respondent's Sixth Amendment rights by using a private party to do what the government itself could not do. Compare *United States* v. *Valen*, *supra*, 479 F.2d at 469, with *Corngold* v. *United States*, *supra*, 367 F.2d at 5. Thus, even if Nichols did question respondent in a fashion prohibited to the government itself, this would "evidence[] something less than that degree of [government] participation" that concerned the Court in *Massiah*. *United States ex rel. Milani* v. *Pate*, 425 F.2d 6, 8 (7th Cir.), cert. denied, 400 U.S. 867 (1970).

This conclusion is not inconsistent with the Court's decision in *Sherman* v. *United States*, 356 U.S. 369 (1958), in which the Court concluded that the defendant had been entrapped into dealing in narcotics by the overbearing urgings of an informant. The Court discussed (356 U.S. at 374-375) the prior relationship between the government and the informant and noted (*id.* at 374-375) that "the federal agent in charge of the case admitted that he never bothered to question [the informant] about the way he had made contact with [the defendant]." Against this background, the Court concluded that the government could not utilize the services of an informant in this manner and then disassociate itself from his conduct (*id.* at 375). *Sherman* contrasts sharply with the present case. Far from showing the carelessness that led the Court in *Sherman* to conclude that the government should be responsible for the undirected actions of the informant, the FBI agent here gave Nichols

instructions that indicate "familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*." *Wilson* v. *Henderson*, *supra*, 584 F.2d at 1191. There is therefore no need to impose a broad rule attributing to the government all of the actions of an informant with whom it enters into a limited and specific relationship. Only where the government has directed the informant to question the accused, or has placed the informant in a situation where incriminating statements are likely to be overheard without adequately instructing him—and thereby assuming the risk that the informant would engage in questioning to benefit the government—should the government be held to have "deliberately elicited" statements that are made in response to the informant's questions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DAVID B. SMITH
Attorney

NOVEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305840 140